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IN THE

Supreme Court of the United States

October Term, 1961

No. 214

ADOLPH HOHENSEE,

Petitioner,

—v.—

NEWS SYNDICATE, INC., ETC.,

Respondent.

BRIEF OF RESPONDENT NEWS SYNDICATE CO. INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The decision of the Third Circuit Court of Appeals, below, in *Hohensee* v. *News Syndicate, Inc.*, 286 F. 2d 527 (1961) is *not* in conflict with the decision of any other Court of Appeals on the question presented by the petition:

> "Where jurisdiction is based *solely on diversity of citizenship* and no personal service was effected on the defendant, did the District Court have power to transfer the case to another District under 28 U. S. C., Sec. 1406 (a)?"

Hohensee answered the question in the negative. No other Court of Appeals has considered the question.

I

There is no "conflict of decisions", of any substance, and the case below was correctly decided.

Only *three* of the cases cited in petitioner's brief have dealt with the "Question Presented" by his petition.

Hohensee—from which the instant petition arises—held, in accordance with the language of § 1406(a), the intent of its draftsmen, and the weight of relevant and analogous authority, that "a court is without power to act on a motion under 28 U. S. C. § 1406(a) until it has acquired jurisdiction of the person of the defendant." (App. to Pet. p. 23.) *Skilling* is in accord.

> *Skilling* v. *Funk Aircraft Co.*, 173 F. Supp. 939 (W. D. Mo. 1959).

Lumbermens Mut. Casualty Co. v. *Mohr*, 87 F. Supp. 727 (S. D. Tex. 1949), which appears to represent a contrary holding, is readily distinguishable. The plaintiff had been unable to effect service of process, and the venue of the action was also improper; the Court ordered a transfer to the Northern District of Alabama. Nothing in the Court' opinion, however, indicates that its power to do so, absent personal jurisdiction over the defendant, was put in issue. Moreover, in view of its answer to the question whether the case *should* be transferred pursuant to § 1406-(a)—

> "This question I think *must* be answered in the affirmative . . ." (Emphasis supplied) 87 F. Supp. at 728—

it is apparent that the District Court felt constrained to follow the literal wording of § 1406(a) as that section was originally enacted in 1948.*

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* The 1948 enactment (June 25, 1948, c. 646, § 1; 62 Stat. 937) which read, "The district court . . . *shall transfer* . . .", appeared

It is not necessary to re-examine the soundness of *Lumbermens*, as decided under the old statute, to conclude that its force has not survived the 1949 enactment as interpreted and applied subsequently by the courts of two other Circuits.

II

The "§ 1404(a) cases" add no weight to the petition before the Court.

Petitioner's brief also cites three cases which decided the question whether, in a diversity case where no effective personal service had been made on defendant, a transfer "for the convenience of parties and witnesses" could be ordered pursuant to 28 U. S. C. § 1404(a).

Since §§ 1404(a) and 1406(a) are in some respects complementary, these cases—although, strictly speaking, outside the scope of the instant petition—will be briefly noted.

Wilson v. *Kansas City Southern Ry. Co.*, 101 F. Supp. 56 (W. D. Mo. 1951), decided by the same District Court that later decided *Skilling* v. *Funk Aircraft Co.*, *supra*, made clear that a purported transfer pursuant to § 1404(a), in the absence of personal jurisdiction over defendant by the transferor court, was as improper as would be a transfer pursuant to § 1406(a) under like circumstances.

McDaniel v. *Drotman*, 103 F. Supp. 643 (W. D. Ky. 1952), decided by a District Court in the Sixth Circuit, is of like effect.

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to some to make transfer mandatory, upon a showing of improper venue, without examination of the jurisdictional basis for the transfer order. To correct this danger of abuse, among others, § 1406(a) was amended in 1949 (May 24, 1949, c. 139, § 81; 63 Stat. 101) to read, "The district court . . . *shall dismiss, or if it be in the interest of justice, transfer* . . ."

Since the District Court concluded it "*must*" transfer, it seems plain that it was relying on the original enactment.

Petroleum Financial Corp. v. *Stone*, 116 F. Supp. 426 (S. D. N. Y. 1953), on the other hand, appears to lend credence to the instant petition—but only if viewed uncritically and out of context. In *Petroleum*, Judge Dimock of the District Court of the Southern District of New York ordered a transfer pursuant to § 1404(a) in a diversity case where there had been no valid service upon defendant, on what he understood to be the authority of *Schiller* v. *Mit-Clip Co.*, 180 F. 2d 654 (2 Cir. 1950).* It now appears, however, that Judge Dimock, who said

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* *Schiller* originated as a private anti-trust action—not a diversity case—filed in the Southern District of New York. Plaintiff, invoking the provisions of 15 U.S.C. § 22, had purported to serve defendant, a foreign corporation, outside the state. On defendant's motion to dismiss, on the ground that it was not subject to suit in the Southern District of New York, the District Court, *sua sponte*, ordered the action transferred to the District Court in Minnesota under § 1406(a). Plaintiff appealed from the District Court's order holding that defendant was not subject to suit in the Southern District of New York, and alternatively sought a writ of *mandamus*, and defendant argued in support of the transfer.

The Second Circuit, in a *per curiam* opinion, upheld the lower court's decision of the venue question and criticized plaintiff's temerity in challenging the District Court's order which spared him the dismissal "he so richly deserved." It is clear from the opinion, however, that the Court of Appeals never passed on the propriety of the order of transfer:

> "Whether we should have any jurisdiction, either by appeal, or by *mandamus*, to review such an order, we need not decide." 180 F. 2d at 655.

Whether the District Court, in *Schiller*, may have felt obliged to transfer by the language of § 1406(a) as originally enacted, or whether the District Court may have concluded that defendant had waived objection to the *in personam* jurisdiction question, have now become academic questions. The Second Circuit's recent opinion in *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579 (2 Cir. 1961) has made it clear that defendant, in *Schiller*, waived any jurisdictional objection on appeal by arguing for the transfer:

> ". . . any learning to be derived from *Schiller* in regard to Section 1406(a) must be limited to cases in which the defendant may be said to have waived his right to object to the jurisdiction of the transferor court by arguing for the transfer." 288 F. 2d at 584.

> "Although I entertain serious doubts upon the matter, I will follow what the language of the Court of Appeals [in *Schiller*] indicates to be the law of this Circuit . . . ", 116 F. Supp. at 429,

was right in entertaining serious doubts. Not only was it pointed out by the same court, per Judge Palmieri, in *Goldlawr, Inc.* v. *Shubert*, 175 F. Supp. 793 (S. D. N. Y. 1959), app. dism. 273 F. 2d 729, that the Court of Appeals had never reached that question in *Schiller*, but the Court's recent affirmance of Judge Palmieri's decision, *sub nom. Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579, 584 (1961), repudiates the *Petroleum* decision as "[having] its genesis in a misconception of the holding [in *Schiller*]" and leading to "unwarranted construction of the statute."

It is clear, therefore, that the "§ 1404(a) cases" to date cannot be said to contradict the rule enunciated in *Hoheusee*, and add no weight to the instant petition.

III

The "question presented" on the instant petition is limited to diversity cases. No re-examination of non-diversity cases is called for.

In cases arising under the diversity jurisdiction of the Federal District courts, in which

> ". . . a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State . . ." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945),

many questions must be answered differently than in cases arising under federal law. Therefore, whether or not the rule regarding the propriety of transfer under § 1406(a), in the absence of jurisdiction over defendant, in non-

diversity cases should be the same as the settled rule in diversity cases is a question not presented by the instant petition.

Nonetheless, petitioner has cited a number of non-diversity cases in support of his argument that the authorities are divided on the question of whether transfer pursuant to § 1406(a) (and § 1404[a]) must be predicated upon personal jurisdiction over the defendant.

The non-diversity cases which petitioner concedes accord with the ruling in *Hohensee*, and which therefore require no further discussion here, are:* *Goldlawr, Inc.* v. *Shubert*, 175 F. Supp. 793 (S. D. N. Y. 1959), app. dism. 273 F. 2d 729 (private anti-trust action); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F. Supp. 681 (W. D. Ky. 1957) (claims under Railway Labor Act); *Fistel* v. *Beaver Trust Co.*, 94 F. Supp. 974 (S. D. N. Y. 1950) (action under § 16(b) of Securities Exchange Act of 1934).

There are four non-diversity cases cited by petitioner which do not accord with the decision in *Hohensee*.

Internatio-Rotterdam, Inc. v. *Thomsen*, 218 F. 2d 514 (4 Cir. 1955), was an admiralty case which concluded:

> "It is proper to institute a suit in admiralty in a district in which there is no person who can be served with process and no property which can be seized, if it is made to appear that property which can be seized under process therein is expected to be within the dis-

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* This, perhaps, is the place to point out that none of the following cases, although relied on by petitioner, involved the propriety of transfer *absent personal jurisdiction over defendant*: *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (3 Cir. 1952); *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (3 Cir. 1951), affd. 344 U.S. 861 (1952), reh. den. 344 U.S. 900; *Gulf Research & Development Co.* v. *Harrison*, 185 F. 2d 457 (9 Cir. 1950); *Untersinger* v. *United States*, 181 F. 2d 953 (2 Cir. 1950), aff'g 87 F. Supp. 532 (S.D.N.Y. 1949); *Orr* v. *United States*, 174 F. 2d 577 (2 Cir. 1949); *Brandt* v. *Eastern Air Lines*, 120 F. Supp. 745 (S.D.N.Y. 1948).

> trict shortly . . . When suit is so instituted, which has the effect of preserving the rights of libellant against the running of the statute, and the vessel does not appear in the district as anticipated but does appear or is expected to appear in another district, it seems clearly within both the letter and the spirit of 28 U. S. C. § 1406 (a) to transfer the case . . ." 218 F. 2d at 515-16.

Note, however, that in a footnote to the quoted paragraph the Court took care to stress that:

> "A suit in admiralty must be distinguished in this respect from *a civil action based on diversity of citizenship* in which venue is limited by statute."

In *Orzulak* v. *Federal Commerce and Navigation Co.*, 168 F. Supp. 15 (E. D. Pa. 1958), also an admiralty case, the District Court followed *Internatio-Rotterdam.*

In *Amerio Contact Plate Freezers, Inc.* v. *Knowles*, 274 F. 2d 590, 591 (D. C. Cir. 1960), the District of Columbia Court of Appeals held that the District Court below, in an action brought under the patent laws, had power to transfer venue pursuant to § 1406(a) and that "The court's lack of jurisdiction over the person of the defendant is immaterial." The Court, without analysis, relied principally on *Schiller* v. *Mit-Clip Co., supra,* and *Internatio-Rotterdam.*

Commenting on the *Amerio* case, the Second Circuit has recently said it is one of the cases that had

> ". . . genesis in a misconception of the holding of this court in Schiller v. Mit-Clip Co., 2 Cir. 1950, 180 F. 2d 654 . . .
>
> "The recent pronouncement in Amerio Contact Plate Freezers, Inc., supra, that personal jurisdiction is immaterial, merely assumes the existence of such a doctrine based upon Schiller and the subsequent cases which in turn revealed no analysis supporting the con-

clusion." *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579, 584 (2 Cir. 1961).

In the sole case remaining to be discussed, *Hayes* v. *Livermont*, 279 F. 2d 818 (D. C. Cir. 1960), a suit arising under the patent laws, the Court reviewed the District Court's denial of defendant's motion to dismiss, vacated the order below, and remanded the case to enable the District Court to consider transfer under § 1406(a), citing the *Amerio* and *Internatio-Rotterdam* cases.

Of the four cases just discussed, it is submitted that *Internatio-Rotterdam* and *Orzulak* are self-distinguishing and that—with all deference—*Amerio* and *Hayes* do not survive the more recent decision in *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579 (2 Cir. 1961).*

In any event, whether or not it is true today that the authorities discussing transfer under § 1406(a) in *non-diversity* cases are in conflict, that "conflict" is outside the scope of the petition herein.

CONCLUSION

This case was correctly decided below, and there is no conflict of any substance in the authorities which have considered the question presented in the instant petition, or which would warrant the grant of the writ.

Respectfully submitted,

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News Syndicate Co. Inc.

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* Respondent herein is informed that a petition for certiorari has been filed in the *Goldlawr* case, and is pending before this Court as No. 101 for the October 1961 term.